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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LOUIE BARRAJAS, Defendant and Appellant.	B231372 (Los Angeles County Super. Ct. No. GA075885)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter. Affirmed as modified.

Susan Wolk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Michael Keller, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Louie Barrajas of carjacking (Pen. Code, § 215, subd. (a);[1] count 1), assault (Pen. Code, § 240; count 2), and unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a); count 3), with a finding attached to each count that Barrajas committed the offense for the benefit of a criminal street gang, and with a finding as to the carjacking that a principal personally used a firearm. (Pen. Code, § 186.22, subd. (b), § 12022.53, subds. (b), (e)(1).) Barrajas thereafter admitted a prior robbery conviction that qualified as a strike. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The trial court sentenced Barrajas to state prison for an indeterminate term of 30 years to life, plus 10 years for the principal-related firearm finding. We affirm Barrajas's convictions, the attached gang and firearm findings and modify the sentence.

FACTS

The Crimes

On the evening of February 7 into 8, 2009, Julio G. attended a house warming party in Alhambra. Julio left the party at about 1:40 a.m. As he walked to his truck a few houses from the party, Julio passed a group of Hispanic males. Julio thought they could be in a gang based on their clothing and manner of speaking. On arriving at his truck, Julio noticed that two of the men had followed him. The men were later identified as Barrajas and Leonard Erentreich, members of the Avenues gang. When Julio opened his truck and put the key in the ignition, Barrajas told Julio to hand over his keys. Julio took the key out of the ignition, then hesitated. At that point, one of the assailants pulled a revolver from his waistband, pointed it at Julio, and pulled the hammer back on the revolver so that Julio heard it "click." Julio gave his keys to Barrajas. Barrajas and the second man then got in Julio's truck, and they drove it away.[2]

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[1] All further code references are to the Penal Code unless otherwise specified.

[2] The operative pleading alleged that Barrajas had personally used a firearm in the commission of the carjacking, and Julio G. testified at trial that Barrajas used the revolver. However, the jury found a personal use allegation as to Barrajas to be not true. The jury found a principal personal use allegation to be true. In light of the jury's verdict, we do not identify Barrajas as the assailant who personally used the firearm.

Julio G. called 911. He told the police that he had a "LoJack" recovery system in his truck. After the truck's LoJack system was activated, the vehicle was tracked to a house on Verdugo Road in Los Angeles. Los Angeles Police Department (LAPD) Officer Lenny Torres and his partner, Officer Claudio Gutierrez, responded to the scene. Nobody was in the truck; the officers set up surveillance on the vehicle. Eventually, a group of people came out of the house, got into the truck, and drove away. Officers Torres and Gutierrez stopped the truck near the intersection of Bushwick Street and Estara Drive.[3] Barrajas, another male, and two female occupants were detained at the scene. A third man, later identified as Wilfredo Abitia, another Avenues gang member, who had been in the bed of the truck, ran away.

Approximately two and one-half hours after he had been carjacked, Julio G. received notice that his truck had been recovered. Police drove Julio to a location on Bushwick Street where three men were being detained near Julio's truck. Julio identified Barrajas as the person who pointed the gun at him. Julio identified one of the other two men as the person who had committed the carjacking with Barrajas.

On February 10, 2009, Julio G. went to the Alhambra Police Station, where he viewed a series of photographic lineups. Julio identified Barrajas's photograph as the person who had the gun. From another set of photographs, Julio identified Leonard Erentreich as the other person involved in the carjacking.

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[3] At trial, Officer Torres testified that after the truck was stopped, he and Officer Gutierrez ordered the people inside the truck to exit. Officer Torres saw Barrajas exit from the driver's side door. Officer Torres testified that he "believed" Barrajas was the driver. At trial, Officer Gutierrez testified that the people inside the truck were ordered to exit by the driver's side door. Four individuals — two males and two females — got out of the truck through the driver's side door. Barrajas was one the four individuals who exited from the driver's side door. Officer Gutierrez further testified that about two weeks after the truck had been stopped, detectives showed him two "six-pack" lineup of photographs. From one six-pack, Officer Gutierrez identified the person who had jumped out of the bed of the truck and run from the scene. From the other six-pack, Officer Gutierrez identified a photograph, not Barrajas, as the person who Officer Gutierrez "thought was the driver."

The Criminal Proceedings

In May 2010, the People filed an amended information charging Barrajas with carjacking (§ 215, subd. (a); count 1) and assault with a firearm (§ 245, subd. (a)(2); count 2). The information alleged as to count 1 that Barrajas had committed the offense for the benefit of a criminal street gang. (§ 186.22, subds. (b)(1)(C), (b)(4)). As to count 1, the information alleged that Barrajas personally used a firearm (§ 12022.53, subd. (b)) and that a principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)). As to count 2, the information alleged that Barrajas personally used a firearm (§ 12022.5, subd. (a)) and committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(B)). The information alleged that Barrajas had suffered a prior conviction within the meaning of the "Three Strikes" law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

In September 2010, the charges against Barrajas were tried to a jury. At trial, the prosecution presented evidence establishing the facts summarized above, primarily by the testimony of the victim (Julio G.) and the involved police officers. In addition, evidence was introduced showing that Alhambra Police Department Detectives Wilfredo Ruiz and his partner (Detective Seki) interviewed Barrajas following his arrest. The interview was video recorded and presented at trial. At the outset of the interview, Barrajas denied knowing that the vehicle was stolen. Later during the interview, Barrajas admitted that he was present when the truck was taken, but claimed he was not the one who had the gun and not the one who spoke with the owner of the vehicle. Barrajas admitted that he had been driving the truck when it was stopped. After the People rested, Barrajas rested without presenting any evidence.

During an off-the-record discussion about jury instructions, the trial court granted the People's motion to amend the amended information to add a count 3 – unlawful driving or taking a vehicle. (Veh. Code, § 10851, subd. (a).) On September 20, 2010, the jury returned a verdict finding Barrajas guilty of carjacking with a gang benefit finding. The jury found the allegation that Barrajas personally used a firearm to be not true; the jury found the allegation that a principal personally used a firearm to be true. The jury

also returned a verdict finding Barrajas not guilty of assault with a firearm, but returned a verdict finding him guilty of the lesser offense of assault with a gang benefit finding. The jury returned a verdict finding Barrajas guilty of the unlawful taking or driving of a vehicle with a gang benefit finding. Barrajas thereafter admitted the prior strike allegation.

On March 3, 2011, the trial court denied Barrajas's motion to dismiss his prior strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court then sentenced Barrajas to state prison for an indeterminate term of 30 years to life, plus 10 years. On the carjacking in count 1, the court imposed a term of 15 years to life pursuant to section 186.22, subdivision (b)(4). The court doubled the term based on Barrajas's prior strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and then also added a 10-year term for the firearm use by a principal enhancement (§ 12022.53, subds. (b), (e)(1)). On the simple assault conviction in count 2, the court applied section 654 and "permanently stay[ed] any sentence." On the taking or driving a vehicle conviction in count 3, the court imposed a concurrent, determinate term of seven years (the two-year midterm, doubled to four years for the prior strike, plus a three-year gang enhancement term).

Barrajas filed a timely notice of appeal.

DISCUSSION

I. The Sentence on Carjacking in Count 1

On the carjacking conviction in count 1, the trial court sentenced Barrajas to a term of 30 years to life (15 years to life, doubled). The life sentence was based on the gang benefit enhancement statute, section 186.22, subdivision (b)(4), which provides that a person convicted of carjacking with a true finding on the gang enhancement is to be sentenced to the greatest of one of three life terms, here, 15 years to life. The court also added a 10-year term for the principal use of a firearm enhancement, pursuant to section 12022.53, subdivisions (b) and (e)(1). Barrajas contends, the People agree, and we rule that the sentence imposed for the firearm enhancement as to count 1 is legally unauthorized. Because the jury returned a "not true" finding on the allegation that

Barrajas personally used a firearm in the commission of the carjacking offense, the sentencing rule prescribed by section 12022.53, subdivision (e)(2), applies. Section 12022.53, subdivision (e)(2), provides that an enhancement under the gang benefit statute "shall not be imposed on a person in addition to [a firearm enhancement] *unless the person personally used or discharged a firearm* in the commission of the offense." (Italics added.) In short, a sentencing court may not impose *both* a gang benefit enhancement and a firearm enhancement in the absence of a finding that the defendant personally used a firearm. The sentencing rule in such a situation is to apply the enhancement that will result in the greater punishment. (See § 12022.53, subd. (j).) The term for carjacking, without applying the life term sentence applicable as a result of the gang enhancement, is three, five or nine years (§ 215, subd. (b)). Even if the high term of 9 years were chosen, and the enhancement of 10 years for the principal armed were added to the term, resulting in a 19-year sentence, it would not exceed the 15-year-to-life term, under which Barrajas could serve his entire life in prison. Accordingly, we strike the 10-year term for the principal use of a firearm.

II. Sentencing Pursuant to the Gang Benefit Statute

Barrajas contends the trial court erred by sentencing him to a term of 30 years to life (15 years to life, doubled) as to count 1 (carjacking) pursuant to section 186.22, subdivision *(b)(4)(A)*. The problem, argues Barrajas, is that "the jury never rendered a finding" as to section 186.22, subdivision *(b)(4)(A)* – the provision providing for a life term — but only as subdivision *(b)(1)(C)*— the provision providing a 10-year enhancement on violent felonies.[4] We find no error.

As a matter of federal Constitution law, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490

[4] The operative document, the amended information filed in May 2010, included allegations as to count 1 (carjacking) citing to section 186.22, subdivisions (b)(1)(C) and (b)(4), in two separate paragraphs. However, the verdict form given to the jury included language only as to section 186.22, subdivision (b)(1)(C).

(*Apprendi*.) Here, Barrajas's sentence pursuant to section 186.22, subdivision *(b)(4)(A)*, did not violate the rule articulated in *Apprendi* because his sentence was based upon facts found true by the jury, and was not based upon any additional fact found true only by the trial court. The jury found that Barrajas committed the carjacking alleged in count 1 for the benefit of a criminal street gang, and with the intent to further criminal conduct by the gang members. For the trial court, the decision whether to sentence Barrajas pursuant to section 186.22, subdivision *(b)(1)(C)*, or subdivision *(b)(4)(A)*, was simply a matter of applying the gang enhancement based upon the substantive crime he committed. Because carjacking is one of the crimes to which section 186.22, subdivision (b)(4)(A), applies, there was no error.

In his reply brief, Barrajas asks "what is the point" of placing an allegation as to section 186.22, subdivision *(b)(4)(A)*, on the face of the amended information in count 1 (carjacking), "if the jury did not have to make a finding that the [*(b)(4)(A)*] allegation was true or untrue?" We answer that the point of the (b)(4)(A) allegation was to put Barrajas on notice of the potential punishment that he faced. As for the jury, they needed to make a unanimous finding that he committed the carjacking for the benefit of a criminal street gang, regardless of language in the information as to subdivision *(b)(1)(C)* or *(b)(4)(A)*. Absent a jury finding that Barrajas committed the carjacking for the benefit of a criminal street gang, no gang-related punishment could have been imposed by the trial court at all. However, the absence of any language on the verdict form given to the jury referring to subdivision *(b)(4)(A)*, did not create nor result in *Apprendi* error. All that was required was for the jury to determine the gang use enhancement was true. It was then for the trial court to determine the appropriate sentencing consequences of that finding. That is exactly what occurred here.

III. Sufficiency of the Evidence for the Jury's Gang Benefit Findings

Barrajas contends the evidence is insufficient to support the jury's gang benefit findings. More specifically, Barrajas argues the prosecution's evidence failed to prove two required elements for the gang benefit findings, namely, the "primary activities" of the gang, and a "pattern of criminal activity" by members of the gang. We disagree.

The Governing Law

Section 186.22 prescribes mandatory, added punishments when a person commits certain crimes for the benefit of a "criminal street gang" as defined in the gang benefit statute. As relevant to Barrajas's current appeal, section 186.22, subdivision (f), defines a "criminal street gang" to mean a group of three or more persons "having as one of its primary activities the commission of [enumerated crimes], and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Proof that one of a gang's primary activities is the commission of the enumerated crimes may consist of evidence establishing that the group's members "consistently and repeatedly" have committed such crimes. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.) Such evidence may be presented by expert testimony which is based on a proper factual foundation. (*Ibid*.)

In re Alexander L. (2007) 149 Cal.App.4th 605 (*Alexander*) is instructive on the sufficiency of an expert's testimony regarding a gang's primary activities. In *Alexander*, "[w]hen asked about the primary activities of the gang," a prosecution expert witness gave this testimony: "I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations." (*Id*. at p. 611.) "No further questions were asked about the gang's primary activities on direct or redirect examination." (*Ibid*.) On cross-examination, the expert testified that the "vast majority of cases connected to the [gang] that he had run across were graffiti related." (*Id*. at p. 612.) The Court of Appeal found this state of evidence insufficient to support a finding that one of the gang's primary activities was the commission of crimes enumerated in the gang benefit statute. The evidence was insufficient, ruled the Court of Appeal, because it did nothing more than show that the expert knew the gang had been involved in certain crimes, and did not show that the primary activities of the gang were the commission of crimes enumerated in the gang benefit statute. (*Id*. at pp. 611-612.) The Court of Appeal further ruled that, even if it were accepted that the gang expert had inferentially meant by his testimony to show that

the primary activities of the gang were the crimes to which he referred, his testimony lacked an adequate foundation because his testimony did not show that the underlying bases for his testimony was reliable. (*Id*. at p. 612.)

Evidence of the Gang's Primary Activities and Pattern of Criminal Activity

Here, LAPD Officer Curtis Davis testified as a prosecution expert on the Avenues gang. Officer Davis's testimony established that he is an experienced police officer with extensive involvement in gang matters, including the Avenues gang. Officer Davis explained his personal experiences and contacts with the gang and members of the gang, and explained the types of information he received from other officers concerning the gang and its members, based on those officers' contacts in the course of their official duties. Officer Davis had reviewed court records involving the gang's members. Concerning the primary activities of the Avenues gang, the reporter's transcript shows the following exchange:

> "Q What are some of the primary activities of the Avenues gang?
>
> "A They engage in everything from murder to attempted murder to attempted murder of a police officer, carjacking, robbery, extortion, trafficking, and guns, and narcotics, vandalism, sometimes the chopping of stolen vehicles for profit. [¶] Chopping is a street vernacular term. . . . It's basically when a vehicle is reduced to its component parts and sold.
>
> "Q When Avenues gang members are performing these primary activities, is it done solo or with other members?
>
> "A Sometimes it is done solo, sometimes it's done with other members. It really depends on the circumstances.
>
> "Q When it's done with other members, do you expect Avenues gang members to talk about those primary activities that they are doing?
>
> "A Yes. Even if it's done solo, one of the important things in the gang culture is reputation, so there is a lot of bravado. Even in the gang culture there is something celebrated about somebody being loco, which is the Spanish word for crazy. So they try to kind of create their own legend with that. [¶] And some of the crazier ones will openly talk about some of their acts to their other gang members because they are hoping to achieve additional status in the gang. [¶] And as a gang it's actually a hierarchal organization. So just like we have businesses, legitimate businesses in

which you can promote, within the gang it's something similar. If you have gang members that put in work, which is what they do to promote within the organization, like committing criminal acts that further the gang, they get additional status and power.

"Q Have you heard of the term putting in work?

"A Yes.

"Q What does that mean in relation to gangs?

"A It's basically a gang phrase. It's street vernacular. It means that a gang member is loyal to his gang and he is actively going out and committing those acts which would benefit the gang. Specifically, I am talking about criminal acts.

"Q: When Avenues gang members perform these criminal activities, are they limited to their territory?

"A No.

"Q Why not?

"A Gang members and the gangs themselves are trying to expand their territories because that is their market share. The areas in which they control are the areas in which they tax, collect taxes from other drug dealers, street vendors, and sell narcotics themselves. It's a very well organized operation. So the larger territory that these gangs control, the more money they are taking in. [¶] I have personally been involved in some investigations that have involved this particular gang as far as Utah, Nevada, and so forth.

"Q You say controlling territory. How is it that a gang controls territory?

"A When a gang moves against another gang, when it starts victimizing another gang, it is basically trying to occupy the turf in which they presently occupy. Or if there is no gang there, they will start establishing presence there. And once that's in place, then they start selling the drugs and they create this culture and fear in the community which makes people very reluctant to testify against the gang. They are afraid of retaliation."

Analysis

The gang expert's testimony at the jury trial in Barrajas's current case is not of the same conclusory nature as was presented at the court trial in the *Alexander* juvenile case, nor did it suffer from the same lack-of-foundation omissions. Officer Davis's testimony was supported by a proper foundation that allowed for evaluation of his opinions. He did not simply testify in a cursory fashion concerning what he "knew" about crimes committed by the Avenues gang; he testified about facts that he learned from his own experiences, and from information gathered from other police officers in the performance of their official duties, as well as from court records. Officer Davis's testimony about the gang's primary activities in the criminal arena was more than a conclusory statement that they committed certain types of crimes.

IV. Challenge to Parts of the Gang Expert's Testimony

Barrajas contends his convictions must be reversed because the prosecution's gang expert, Officer Davis, offered testimony that members of the Avenues gang engage in the "attempted murder of a police officer." Barrajas claims the testimony was "unsupported" by a proper foundation, and unduly prejudicial. Barrajas contends the testimony resulted in a denial of his constitutional rights to confrontation, due process, and a fair trial. We find no reversible error.

First, as a matter of evidentiary error, Barrajas's claim is forfeited because he did not interpose an objection when Officer Davis spoke the words "attempted murder of a police officer." (*People v. Brady* (2010) 50 Cal.4th 547, 576.) Forfeiture also applies to Barrajas's claim that the testimony created constitutional error. (*People v. Geier* (2007) 41 Cal.4th 555, 611.) Barrajas cites *People v. Hill* (1998) 17 Cal.4th 800, 820, in support of an argument that forfeiture should not be found in his case because an objection would have been futile.[5] We understand his futility argument to be based on two factors: (1) he could not have undone the damage once the jurors heard the unduly prejudicial testimony that the Avenues gang engaged in the crime of attempting to murder a police officer, and

[5] *People v. Hill, supra*, 17 Cal.4th at page 820, discusses the futility concept in the context of a claim of prosecutorial misconduct.

(2) any objection would only have highlighted the evidence. Barrajas has not persuaded us to retreat from the rule of forfeiture. A reviewing court may find an objection would have futile when the record suggests that any attempt to address the situation would have been ineffective. (*People v. Arias* (1996) 13 Cal.4th 92, 159 [prosecutorial misconduct].) We see no such indication in the record before us today; we see nothing to suggest that an objection and instruction to the jury to disregard the testimony would not have been useful. We summarily reject Barrajas's assertion that an objection would have been futile because it would have highlighted the evidence. Such a proposition would recognize "an exception that would swallow the rule" of forfeiture, because such a claim "could be true in nearly every case in which a defendant fails to object." (*People v. Wilson* (2008) 44 Cal.4th 758, 800-801.)

Even if Barrajas's evidentiary claim was not forfeited, we would not reverse. Assuming Officer Davis's words "attempted murder of a police officer" were subject to exclusion for want of a proper foundation and/or under the balancing test that is codified in Evidence Code section 352, we find the error in the admission of the evidence to have been harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We see no probability that Officer Davis's passing reference to "attempted murder of a police officer" had any affect on the jury's determination of guilt in Barrajas's case. Indeed, the jury's decision to acquit Barrajas of the crime of assault with a firearm, and its finding that he did not personally use a firearm, indicate in our view that the jury carefully weighed whether or not the prosecution proved its case beyond a reasonable doubt. The evidence against Barrajas was strong. The victim, Julio G., identified Barrajas shortly after the carjacking, and again at trial. Barrajas was apprehended driving Julio's vehicle within a few hours after the carjacking. Barrajas admitted in an interview that he was present at the scene. In addition, a number of other crimes were mentioned by Officer Davis as primary activities of the gang, including carjacking, robbery, extortion, trafficking, the mention of guns, and narcotics, vandalism, and disassembling the chopping of stolen vehicles for profit. That attempted murder of police officer was added to this list would not have

suddenly tipped the scales such that Barrajas was convicted on the basis of the mention of that crime.

We would similarly reject Barrajas's contention that Officer Davis's "attempted murder of a police officer" words created an error of constitutional magnitude justifying reversal. There is no constitutional issue unless a defendant demonstrates that an error in admitting evidence rendered his or her trial fundamentally unfair. (See *People v. Partida* (2005) 37 Cal.4th 428, 439.) Officer Davis's use of the words "attempting to murder a police officer" — viewed in the context of the entire trial record — does not persuade us to find Barrajas's trial was fundamentally unfair. We do not see a prosecution where the gang evidence "approached being classified as overkill," with such little relevance and with such extraordinary prejudice, that it raised the distinct potential to sway the jury to convict regardless of Barrajas's actual guilt. (See, e.g., *People v. Albarran* (2007) 149 Cal.App.4th 214, 228 (*Albarran*).)

V. The Gang Injunction Evidence

Barrajas contends his convictions must be reversed because the trial court erred in allowing the prosecution — during the gang expert's testimony — to elicit evidence that showed Barrajas had been served with a gang injunction, and had twice suffered a "gang injunction conviction." We find no reversible error.

The Trial Context

Before trial, and, again, before the gang expert took the stand, Barrajas's counsel objected pursuant to Evidence Code section 352 to the introduction of evidence that he had two prior convictions for violating a gang injunction, arguing that such evidence was more prejudicial than probative. The trial court overruled the objection upon finding the convictions were material and relevant in that they tended to establish that Barrajas was a member of the Avenues gang. The court indicated that it would permit defense counsel to ask questions on cross-examination that might explain how someone who was not a member of a gang might be drawn within the reach of such injunction.

During trial, the gang expert, Officer Davis testified that Barrajas had twice been convicted of violating a gang injunction which prohibited him from associating with any other documented gang members. At the time Barrajas was served with the injunction, he was with a known Avenues gang member, Guss Zelaya. In the incident related to his first conviction, Barrajas was associating with two Avenues gang members, Maro Cordero and Dominique Ornello. In the incident related to his second conviction, Barrajas was seen with Jaime Barcena, another Avenues gang member. When Officer Davis offered his opinion that Barrajas was a member of the Avenues gang, Officer Davis relied, in part, on the fact that Barrajas had twice violated a gang injunction by associating with other Avenues gang members.

Analysis

A trial court's evidentiary ruling under Evidence Code section 352 is reviewed for abuse of discretion; this means, we will not find error absent a showing on appeal that the trial court's ruling was arbitrary or patently absurd. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609; *People v. Jordan* (1986) 42 Cal.3d 308, 316.) We see no absurdity here.

The evidence that Barrajas twice violated a gang injunction by associating with documented members of the Avenues gang tended to show that he also was a member of the gang. Gang membership was an element of the case charged against Barrajas. Thus, the evidence was relevant.

Barrajas recognizes that the gang injunction evidence was relevant, but argues it should have been excluded nevertheless because (1) it was unnecessary in that it was cumulative to other evidence of his gang membership, and (2) it was unduly prejudicial. We do not agree. Although the trial court reasonably could have excluded the gang injunction evidence, the issue on appeal is not whether another ruling would have been reasonable, but whether the ruling actually made by the trial court exceeded the bounds of reason. It did not. Apart from the gang injunction evidence, the proof of Barrajas's membership in the Avenues gang largely consisted of his own admissions to Officer

Davis and to other police officers during various encounters on the streets.[6] The gang injunction evidence was of a different nature than his admissions. The evidence was not cumulative.[7]

Juxtaposed against its relevance, the evidence showing Barrajas's gang injunction violations was not unduly inflammatory, particularly in light of the fact that the case against him involved gang-related offenses. Showing the jury that Barrajas associated with other documented members of the Avenues gang in violation of an injunction had little potential for evoking an emotional bias against Barrajas or for causing the jury to convict him apart from the evidence of his guilt. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) The trial court acted within its wide discretion in admitting evidence that Barrajas violated a gang injunction applicable to members of the Avenues gang.

Assuming there was error, it is harmless under any standard of review. (Compare *People v. Watson, supra*, 46 Cal.2d at p. 836; with *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) We see no probability that the evidence affected the outcome of Barrajas's trial. To the extent that Barrajas argues there was no limiting instruction regarding uncharged crimes along the lines of CALCRIM No. 375, leaving the jury unhindered to view him as a person of bad character, we still are not persuaded to find prejudice. As discussed above in addressing Barrajas's claim of error as to the gang expert's testimony regarding the attempted murder of a police officer, the jury's verdicts rendered in this case, and the strength of the evidence against him, cut against any claim that the evidentiary error with respect to the gang injunction evidence was prejudicial.

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[6] The subject of Barrajas's admissions as recorded on police "field identification" cards is the basis of a separate claim of error raised by Barrajas on appeal. We address that claim in Part VI, *infra*.

[7] The prosecution did not call several witnesses to testify that Barrajas admitted his gang membership. One witness, the gang expert, testified about Barrajas's admissions, and testified about his actions that tended to show gang membership, i.e., his violation of the gang injunction.

VI. Uncharged Offenses

Barrajas contends his convictions must be reversed because the gang expert's testimony improperly informed the jury of "numerous uncharged offenses," and the trial court did not give any instruction directing the jury on the limited purpose for which the evidence of such uncharged offenses could be considered. We find no basis for reversal.

The Subject Testimony

During Officer Davis's gang expert testimony, he discussed the subject of field identification (FI) cards. As explained by Officer Davis, an FI card is "basically . . . a reference [document] detailing the reason why police officers stop somebody, along with their identifying information." There are "boxes" on the FI card for recording "if they are working with the businesses, phone number, tattoos, clothing, place of birth and so forth." Officer Davis testified that Barrajas had made admissions to police officers that he was a member of the Avenues gang, and that the admissions were documented on FI cards. Officer Davis testified that, in preparing to testify at Barrajas's trial, he looked at "approximately 15" FI cards related to Barrajas, and that on "most of them," the police officer had recorded that Barrajas admitted being a member of the Avenues gang. Officer Davis further testified that the FI cards he had reviewed showed that Barrajas was in the company of other known members of the Avenues gang when he had been stopped, that he had been wearing "Dodger gear" or "L.A. gear,"[8] and that the "locations where . . . Barrajas was stopped and [the] FI cards were filled out" were "within Avenues gang territory."

Analysis

We will not reverse for two reasons. First, Barrajas forfeited any claim of error concerning the evidence related to the F. cards by failing to object at trial. (Evid. Code, § 353; *People v. Brady, supra,* 50 Cal.4th at p. 576; *People v. Partida*, *supra*, 37 Cal.4th at pp. 433-435.) Second, the trial court would not have exceeded the bounds of reason in

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[8] In other parts of his testimony, Officer Davis described how the members of the Avenues gang often wore sportswear with Dodgers logos, or the letters "L.A.," to mean "Los Avenidos"—roughly, The Avenues.

allowing Officer Davis to testify about the FI cards related to Barrajas. The testimony was relevant in that it established a basis for Officer Davis's opinion that Barrajas was a member of the Avenues gang. The counter-balance to the relevance of the evidence did not mandate exclusion of the evidence. To the extent Barrajas argues the jury may have speculated that the FI cards reflected arrests for other crimes he committed, i.e., the FI cards amounted to improper character evidence in the form of prior bad acts, the evidence fostered no such speculation. At no point did Officer Davis ever testify that the FI cards were filled out in connection with an actual arrest of Barrajas, or even a criminal investigation. Apart from this, Officer Davis's explanatory testimony of the use of FI cards showed that, while an FI card might be filled out in an arrest or investigation situation, this was not always the situation. An FI card might be filled in a "consensual encounter" where a person "basically [is] free to leave at any time." As Officer Davis explained, part of a police officer's job "is gathering gang intelligence, so it's not always an adversarial relationship with gang members. We are out on the street. We are talking to them, sometimes engaging in intervention. We try to stay as a constant point of contact in their lives, so sometimes we may drive by and just ask them how they are doing, then continue on our way." Because the evidence concerning the FI cards did not show that Barrajas had been arrested 15 times, or any number of times, or even been the object of an investigation, we cannot declare that it would have been unreasonable for the trial court to find the probative value of Officer Davis's testimony about the FI cards outweighed any potential for undue prejudice.

VII. The Limiting Instruction Issue

Barrajas contends his convictions must be reversed because the trial court failed to give a limiting instruction — sua sponte — concerning the evidence of his gang injunction convictions and his admissions to being a gang member as recorded on police FI cards. Barrajas contends the instructional error resulted in a denial of his right to due process vis-à-vis a fair trial. We find no ground to reverse.

A court is not required to instruct a jury sua sponte with a limiting instruction. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1094; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052.) This rule applies to evidence of gang membership (see, e.g., *People v. Jones* (2003) 30 Cal.4th 1084, 1116) and to evidence of past criminal conduct (see, e.g., *People v. Collie* (1981) 30 Cal.3d 43, 63-64.) Our Supreme Court has recognized one exception to this rule. A duty to give a limiting instruction sua sponte may be required in " 'an occasional extraordinary case in which unprotected evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.' " (*People v. Mendoza*, *supra*, at p. 1094, citing *Collie*, at p. 64.)

We do not perceive Barrajas's current case to be extraordinary. Evidence of past offenses was not dominant against Barrajas; the carjacking victim provided a solid identification, and Barrajas was apprehended in the victim's stolen vehicle. Against this solid proof, the gang injunction evidence and the FI card evidence was not minimally relevant, but rather highly probative of the gang enhancements alleged in the case. Moreover, the gang injunction conviction evidence and the FI card evidence cannot be viewed as inflammatory; it truly did little more than show gang membership. It did not show acts that might be viewed as being callous, tending to inflame passion. Given that Barrajas's case was rather garden-variety insofar as gang cases are concerned, we see no extraordinary elements imposing a duty upon the trial court to instruct the jury sua sponte with a limiting instruction. Barrajas's trial was not rendered fundamentally unfair by the absence of a limiting instruction.

VIII. The Expert's Testimony and the Ultimate Facts in the Case

Barrajas contends the jury's gang benefit findings must be reversed because the trial court improperly allowed the prosecution's gang expert to testify that, in his opinion, the gang benefit allegations were true. We disagree.

An expert witness may offer testimony in the form of an opinion on a subject that is sufficiently beyond common knowledge such that the opinion of an expert would assist the trier of fact. (Evid. Code, § 801, subd. (a).) Gang culture is such a subject. (*People*

v. Gardeley (1996) 14 Cal.4th 605, 618-620.) An expert may offer opinion testimony based upon facts given in a hypothetical question asking the expert to assume their truth. (*Id*. at p. 618.) Such a hypothetical question must be rooted in the evidence presented in the case being tried. (*People v. Vang* (2011) 52 Cal.4th 1038, 1046 (*Vang*).) Gang experts are allowed to opine whether a crime involving a hypothetical set of given facts was of such a nature that it would have been committed for the benefit of a criminal street gang. (*Gardeley, supra*, at pp. 618-620; see also *People v. Albillar* (2010) 51 Cal.4th 47, 63; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 [approving expert testimony that focused "on what gangs and gang members typically expect"].)

These rules stated, the permissible scope of an expert's testimony regarding gang issues has limits. *People v. Killebrew* (2002) 103 Cal.App.4th 644 (*Killebrew*), the main case upon which Barrajas relies, is instructive on the limits of an expert's testimony. In *Killebrew*, the Court of Appeal ruled that expert improperly had been allowed to testify regarding the knowledge and intent of the defendants on trial rather than the expectations of gang members in general; i.e., the expert had essentially testified that he actually knew what was going on inside the defendants' minds at the time they committed the charged crime. (*Killebrew, supra,* at p. 658; see also *Vang, supra,* 52 Cal.4th at pp. 1047-1049 [*Killebrew* only bars expert testimony concerning the knowledge or intent of the actual suspects on trial].) The *Killebrew* rule does not bar hypothetical questions "solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence." (*Vang, supra,* at p. 1051.)

In Barrajas's current case, the expert testimony did not cross the line into an area that resulted in *Killebrew* error. Here, the prosecutor posed a hypothetical question to the gang expert, Officer Davis, tracking facts like those in Barrajas's case. The hypothetical question did not refer to Barrajas or to any person. The hypothetical question asked for Officer Davis's opinion whether the crimes in the hypothetical situation were committed for the benefit of the gang. In offering his opinion, yes, and explaining why, Officer Davis did not refer to Barrajas or any other person by name, nor did Officer Davis testify he actually knew about Barrajas's mental state at the time he committed the charges

offenses. Because Officer Davis confined his expert opinion to the hypothetical posed rather than to Barrajas personally, his testimony did not exceed the scope of expert opinion. (*Vang, supra,* 52 Cal.4th at p. 1051.) There was no error.

IX. The Right to Present a Defense

Barrajas contends the gang benefit findings must be reversed because the trial court denied his constitutional right to present a defense to the gang benefit allegations. We disagree.

The Trial Setting

Barrajas's claim is based on the following exchange during cross-examination of the gang expert, Officer Davis, by Barrajas's trial counsel:

> "[DEFENSE COUNSEL:] . . . You've indicated that you have known . . . Mr. Barrajas for about three-and-a-half years?
>
> "[OFFICER DAVIS:] Yes.
>
> "[DEFENSE COUNSEL:] Do you remember where he lived about three-and-a-half years ago?
>
> "[OFFICER DAVIS:] I know just based on his family there's been a couple of addresses all within the same several block radius, but there have been a few.
>
> "[DEFENSE COUNSEL:] Would it be fair to say Avenue 53, Avenue 56, those sound right?
>
> "[OFFICER DAVIS:] Yes.
>
> "[DEFENSE COUNSEL:] Avenue 53 and Avenue 56 is like right in the heart of the Avenues [gang]?
>
> "[OFFICER DAVIS:] Yes.
>
> "[DEFENSE COUNSEL:] So in other words, when Louie walks out the door – let me backtrack a second. [¶] You indicated he has no tattoos; correct?
>
> "[OFFICER DAVIS:] At the time I have talked to him, no. At present, I don't know.
>
> "[DEFENSE COUNSEL:] Okay. When Louie walks out the door of his house on Avenue 53 or 57, he is walking right into the heart, as you indicated, of the Avenues; correct?

"[OFFICER DAVIS:] Yes.

"[DEFENSE COUNSEL:] And would it be fair to say that you associate with other officers; right?

"[OFFICER DAVIS:] Can you define association?

"[DEFENSE COUNSEL:] That is what I want you to do.

"THE COURT: No. That is not relevant.

"[DEFENSE COUNSEL:] Well . . . , let's do it this way. [¶] You have fellow officers that you know; correct?

"THE COURT: Counsel, I think that you are going to get into is outside his expertise as to – [¶] . . . [¶]

"[DEFENSE COUNSEL:] All right. [¶] What I am getting at is [that when] you have lived . . . in a neighborhood -- you know, certain people in the neighborhood; correct?

"[THE PROSECUTOR:] I will object[] as to relevance.

"THE COURT: Sustained. I think It's all argumentative.

"[DEFENSE COUNSEL:] All right. I will move along. . . ."

Analysis

A defendant has a constitutional right to confront all witnesses against him. (See *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-680.) The right of confrontation is not unbridled; it guarantees a defendant an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might want. (*Id*. at p. 679.) Trial judges retain wide latitude to impose reasonable limits on cross-examination based on concern over harassment, prejudice, confusion of issues, witness safety, or questioning that is repetitive or only marginally relevant. (*Id*. at pp. 679-680; see also *People v. Ledesma* (2006) 39 Cal.4th 641, 705.) To establish a claim on appeal that a prohibition on cross-examination resulted in a violation the right of confrontation, a defendant must demonstrate that a "significantly different impression" of the witness's testimony would have been produced by the cross-examination. (*People v. Cornwell* (2005) 37 Cal.4th 50, 95, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

According to Barrajas, the questioning by his defense counsel at trial would have shown that, "due to the location of [Barrajas]'s residence . . . , merely by walking out of his home, in the heart of the Avenues gang, [he] would be associating with a member of the Avenues gang." And: "This would have mitigated the evidence that [he] was stopped in the presence of gang members on so many occasions." The ruling to limit his counsel's cross-examination, says Barrajas, "deprived [him] of a meaningful opportunity to present a defense to the gang evidence."

Barrajas's argument does not persuade us to find a violation of his constitutional right to confront Officer Davis to present a defense. By cross-examination, Barrajas's trial counsel elicited testimony from Officer Davis that Barrajas lived in the "heart" of the Avenues gang's territory. The line of permitted inquiry provided a basis for an argument that Barrajas was seen in the company of members of the Avenues gang merely because they were his neighbors. The defense's attempt to question Officer Davis about his own friends and associations was neither relevant nor needed to set up the explanation as to why Barrajas was in the company of gang members. The trial record, in our view, belies Barrajas's claim that he was denied an opportunity to cross-examine Officer Davis about facts concerning Barrajas, his neighbors, and his surroundings. The record shows the defense was denied an opportunity to ask Officer Davis about his neighbors and surroundings. Officer Davis's personal life plainly had nothing to do with Barrajas's ability to present a defense.

X. The Claim that Trial Was Permeated With Gang Evidence

Barrajas contends judgment must be reversed because his trial was permeated by "minimally relevant and extraordinarily prejudicial gang evidence," resulting in a denial of his rights to due process and a fair trial. We disagree.

Barrajas argues his case demonstrates the dangers posed to a defendant's right to a fair trial by the "unbridled" introduction of gang evidence. He views "most" of the gang evidence to have been superfluous, cumulative, or of such questionable relevance that its only purpose must have been to inflame the jury. Under Barrajas's understanding of the law, proof of the gang enhancements required no more than a showing that members of

the gang engaged in a "pattern of criminal activity," i.e., a showing of two qualifying offenses within the appropriate period. He cites Penal Code section 186.22, subdivisions (e) and (j). Accordingly, argues Barrajas, the prosecution's evidence concerning other gang members, gang life, gang territory, the history of the gang, and "gang regulations" was "overkill and unnecessary to meet the statute's requirements." He also objects that the jury heard "astonishingly prejudicial" evidence that a primary activity of the gang included the "attempted murder of a police officer." And he objects that the prosecutor's closing argument "put the gang on trial," and emphasized that Barrajas had been seen with nine other gang members, mentioning by name Leonard Erentreich, Wilfredo Abitia, Guss Zalaya, Sergio Verdugo, Maro Cordero, Gregory Baraza, Arthur Honores, Jaime Barcena, and Dominique Ornello. Barrajas maintains the manner in which the prosecution presented the case against him, emphasizing the sheer size of the gang, its violence and brutality, its rivalries, territory, symbols, practices, criminal enterprises, and rules, violated his federal and state constitutional rights to due process, a fair trial, and reliable verdicts. (See U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 15, 16 & 24.)

We do not share Barrajas's perspective that the prosecution's case against him was tainted by excessive gang-related material, to such an extent that it unconstitutionally permeated the proceedings, rendering his trial fundamentally unfair. The charging document in his case alleged he committed his crimes for the benefit of a criminal street gang, and the prosecution had the burden to prove the gang allegations beyond a reasonable doubt. Barrajas essentially objects that the prosecution over-proved its case. We disagree. Barrajas understates the elements the prosecution was required to prove for the gang enhancement to be found true. It was not enough for the prosecution merely to rest its case upon a presentation of evidence showing a pattern of criminal gang activity.

The punishments prescribed by the gang enhancement statute cannot be imposed in the absence of proof that a defendant was a member of, and acted for the benefit of, a criminal street gang as defined in section 186.22, subdivision (f). Thus, the People were required to prove the existence of an "ongoing organization, association or group of three

or more persons." Evidence of gang organization was not irrelevant, but necessary. The same must be said about the gang's name or common sign or symbol, the gang's primary activities in the realm of committing numerated offenses, and a pattern of criminal activity by members of the gang. (§ 186.22, subd. (f).) Evidence of gang territory, and of gang members with whom Barrajas had been associating on various past occasions was relevant to establish that he was a member of the gang.

In addition, the trial court did not simply rubber-stamp all of the gang evidence that the prosecution sought to introduce. Although the court permitted the prosecution to show that Barrajas had on past occasions been found in association with members of the Avenues gang, the court ruled that it would not allow the gang expert to testify about the backgrounds of other gang members. The court further ruled that evidence of gang membership by Barrajas's father and bothers would not allowed.

Ultimately, the primary proof of criminality against Barrajas came from the victim of the carjacking, and from the arresting police officers. The gang evidence was not used to convict, but to establish the gang benefit allegations. We do not share Barrajas's view that the evidence against him unconstitutionally went beyond that which was required to prove the allegations leveled against him. The Constitution does not require the amount of sanitizing of adverse evidence against a defendant that Barrajas claims.

Barrajas's current case is not, as he argues, akin to *Albarran, supra*, 149 Cal.App.4th 214. *Albarran* arose from a shooting and ensuing crimes as the shooters fled. A jury convicted defendant of attempted murder, shooting at an inhabited dwelling, and attempted kidnapping in the course of a carjacking, with gang enhancement findings under section 186.22. Division Seven of our court reversed, and remanded the case with directions to grant defendant's motion for new trial. In so ruling, Division Seven found that some evidence of defendant's gang membership may well have been relevant to show motive, but that additional gang evidence concerning the gang, including evidence showing gang members had threatened police, references to the "Mexican Mafia," and facts about other gang members and other crimes committed by other gang members which had no connection to the charged crimes, was so prejudicial that it supported a

conclusion that the jury may have convicted defendant apart from the evidence of his actual guilt. (*Albarran,* at pp. 223-232.) We understand *Albarran*'s concerns regarding excessive gang evidence, but find that Barrajas's current case is not of the same tenor. The case against Barrajas did not rise to the same level as was the case in *Albarran*.

XI. Limitation on Arguing Mistaken Identification

Barrajas contends his convictions must be reversed because the trial court denied him the opportunity "to demonstrably argue his defense of erroneous identification," resulting in a denial of his rights to due process and a fair trial. We disagree.

The Trial Setting

Barrajas did not present any defense evidence. The prosecutor gave his argument. Next, immediately before Barrajas's trial counsel began his closing argument, he advised the court that he had something he intended to show the jury, and that the prosecutor had an objection. Barrajas's counsel explained that he intended to show the jury a poster showing sets of coupled photographs which he had compiled from a book entitled "Separated at Birth." As an example, one set of photographs showed "strikingly similar photos of a youthful Hugh Hefner and Orson Bean, while another set show[ed] the photos of Billy Joel and the late criminal Roy Cohn." Barrajas's counsel explained that, in connection with an argument of mistaken identity, he wanted to highlight that different people may look similar. The prosecutor objected that the poster's photographs had not been introduced as evidence, and that they were irrelevant because, and we paraphrase, it did not matter whether a certain person in the world looked like another certain person in the world. The implication proffered by the prosecutor's objection was that the only possible relevant issue would be whether someone else looked like Barrajas, suggesting that Barrajas may have been mistaken for someone else who had actually committed the carjacking. At the end of the discussion of the look-alike poster issue, the trial court ruled that Barrajas's counsel would be allowed to argue that one person could be mistaken for another person, but disallowed use of the poster of celebrity look-alikes. In so ruling, the court rejected defense counsel's reliance on *People v. Travis* (1954) 129 Cal.App.2d 29 (*Travis*), and also expressed its concern that the proffered

photographs had not been authenticated, and that, in an age of digital photography, there was no way to tell whether any of the photographs compiled for "Separated at Birth" had been altered in any way.

Analysis

We see no error. A defendant has a constitutional right to have his or her counsel present closing argument. (*People v. Marshall* (1996) 13 Cal.4th 799, 854.) The right is founded on principles of effective assistance of counsel. (*Ibid.*) The right to have counsel present closing argument is not unlimited; a trial court retains discretion to control the scope of argument to assure that it "does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial." (*Herring v. New York* (1975) 422 U.S. 853, 862.)

There was no abuse of discretion at Barrajas's trial. *People v. London* (1988) 206 Cal.App.3d 896 (*London*) is instructive. In *London*, Rebekah Stites, Sandra Tate and a "Black male" robbed two victims of checkbooks, credit cards and identification papers. The defendant, Kent London, was arrested at a mall where items taken in the robbery were used to buy goods. Four eyewitnesses identified London as being involved in the events at the mall. (*Id*. at p. 901.) London was eventually charged with offenses running the gamut from receiving stolen property, to two counts of robbery, to conspiracy to commit forgery. (*Id*. at p. 900.) The defense was mistaken identity. The jury failed to reach verdicts on the robbery counts, but convicted London of receiving stolen property and three counts of conspiracy to commit forgery. (*Ibid*.) On appeal, London argued the trial court erred when it ruled that defense counsel would not be allowed during closing argument to refer a Time magazine story that discussed an instance in which an eyewitness to a crime mistakenly identified a district attorney as the perpetrator. The Court of Appeal disagreed. (*Id*. at p. 909.) We find the following discussion applicable in Barrajas's current case:

"London points to opinions in which courts have held that particular magazine and newspaper articles were appropriate subjects for closing argument. [Citations.] But such discussions, which reflect particularized exercises of judicial discretion under other

circumstances, did not deprive the trial court of discretion in the case before it. Nothing in the record suggests an abuse." (*London, supra*, 206 Cal.App.3d at p. 909.) In short, the Court of Appeal implicitly observed — without ruling — that the trial court could have allowed the use of the Time magazine article as being with the bounds of reasonableness, but that it was not unreasonable for the court to have disallowed use of the article. We view the circumstances in Barrajas's current case much the same. Further, we add that there were even more appropriate concerns considered in Barrajas's case because of the lack of foundation, and possibility of photo alterations, involved with the "Separated at Birth" material.

Barrajas's reliance upon *Travis, supra*, 129 Cal.App.2d 29 for a different result is not persuasive. In *Travis*, the defendant, James Travis, and a cohort were charged with two counts of robbery and one count of burglary. (*Id*. at p. 30.) At trial, during defense counsel's closing argument, counsel began to read from the opinion in *People v. Simmons* (1946) 28 Cal.2d 699. The trial court interrupted, ruling, "I'm not going to permit the reading from any book which is not in evidence." (*Travis*, at p. 34.) The trial court "made no inquiry as to the portions which counsel wished to read." (*Id.* at p. 36.) On appeal, Division Three of our court ruled that the trial court had erred in restricting defense counsel's argument. (*Id*. at pp. 37-39.) In so ruling, Division Three restated well-settled rules that counsel is largely permitted to "argue in any manner he [or she] considers to be most effective," and that counsel is not strictly constrained by the trial evidence, but may use "wit, and wings to his imagination," and make references to matters of common knowledge, in the effort to persuade the jury. (*Id.* at pp. 37, 39.) In sum, Division Three ruled that the trial court had "confused argument with evidence." (*Id*. at p. 37.) In the end, however, Division Three affirmed Travis's convictions upon finding the error in restricting argument was harmless error. (*Id*. at p. 39.)

We disagree with Barrajas that his case is like *Travis*. Barrajas's trial counsel did not want to read a passage, perhaps inspiring or profound on a rule of law, taken from an officially published court opinion. Barrajas wanted to use material as demonstrative exhibit where it was (1) not admitted into evidence, and (2) had significant lack of

foundation problems. Given the context and circumstances in Barrajas's case, we decline to declare the trial court abused its of discretion in disallowing the use of the celebrity look-alike material during argument. (*London, supra*, 206 Cal.App.3d at p. 909.)

XII. Prosecutorial Misconduct

Barrajas contends his convictions must be reversed for prosecutorial misconduct during closing argument. Specifically, Barrajas argues the prosecutor (1) misstated the evidence, (2) evoked sympathy for the victim, and (3) inappropriately commented upon Barrajas's right not to testify. Barrajas argues the misconduct violated his right to due process of law under the Fourteenth Amendment, to an impartial jury under the Sixth Amendment, and his right against self-incrimination under the Fifth Amendment. We disagree.

As a threshold matter, we reject Barrajas's claims of prosecutorial misconduct because he failed to object at the time of the misconduct and request an admonition that the jury disregard the impropriety on the ground now asserted. (*People v. Thompson* (2010) 49 Cal.4th 79, 120-121 (*Thompson*).) To preserve a claim of prosecutorial misconduct, a criminal defendant must (1) make a timely objection on that ground and (2) request an admonition. (*Id.* at pp. 120-121.) Absent such an objection and request, the claim is forfeited unless an admonition would not have cured the harm. (*Id.* at p. 121; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1328; *People v. Turner* (2004) 34 Cal.4th 406, 421.) Barrajas's argument fails to address why an admonition would not have cured the harm he asserts on appeal. Barrajas's failure to demonstrate why an objection would have been futile is enough to reject his claim of prosecutorial misconduct.

Assuming Barrajas's claims of prosecutorial misconduct are not forfeited, we find no ground for reversing his convictions. As we explain below, we find that either no misconduct occurred or that any misconduct was harmless.

The Governing Law

Under the United States Constitution, a prosecutor who uses deceptive or reprehensible methods to persuade a jury commits misconduct if the actions " 'infect the trial with such " 'unfairness as to make the resulting conviction a denial of due

process.' " ' [Citations.]" (*Thompson, supra,* 49 Cal.4th at p. 120; *People v. Morales* (2001) 25 Cal.4th 34, 44.) Under California law, misconduct occurs when a prosecutor employs deceptive or reprehensible methods to attempt to persuade either the trial court or the jury to reach a desired result. (*Morales,* at p. 44.) A prosecutor's actions may be deemed harmless where the nature of the misconduct and the surrounding circumstances of the case provide no reasonable probability of prejudice that one or more jurors were actually biased. (*People v. Marks* (2003) 31 Cal.4th 197, 233.) Under the *Chapman* test, an error of constitutional dimension requires reversal unless the appellate court finds beyond a reasonable doubt that the error was harmless. (*Chapman, supra,* 386 U.S. at p. 24.)

A. The Prosecutor's Alleged Misstatement of the Evidence

Barrajas claims the prosecutor misstated the evidence by stating the gang expert had reviewed "at least" 15 FI cards, when, in fact, the expert testified he had reviewed "approximately" 15 FI cards. Barrajas claims the misstatement was unduly prejudicial and his constitutional rights to due process and a fair trial were violated. When a claim of misconduct is based on the prosecutor's comments before the jury, " 'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) We find it wholly improbable that the jurors wrongly used the prosecutor's statement when making their verdict. (*People v. Marks, supra,* 31 Cal.4th at p. 233.) We consider the prosecutor's statement to reflect fair comment based upon the totality of the evidence showing Barrajas's notoriety with the Avenues gang and law enforcement. (*People v. Young* (2005) 34 Cal.4th 1149, 1222.) At trial, the gang expert, Officer Davis, testified that he reviewed "approximately" 15 FI cards reflecting contacts between law enforcement officers, and that "on . . . most of them," the officer had recorded that Barrajas admitted to being a member of the Avenues gang. The prosecutor statement during closing that "there have been at least 15 FI cards filled out on Mr. Barrajas. Again, not just one . . . . 15. He's admitted multiple times to officers, 'I am an Avenue gang member.' " The prosecutor's statement was no more than comment

on the evidence.

Even assuming the statement rose to the level of misconduct in that it misstated evidence, rather than merely commented on evidence, we find this to be harmless error. (*People v. Young, supra,* 34 Cal.4th at p. 1223.) In light of the overwhelming evidence, the use of "at least" was a mischaracterization of the evidence that, at most, was trivial to the overall case. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1240.) In other words, if we assumed that the prosecutor's use of the term "at least" rather than "approximately" constituted misconduct, we find there is no likelihood that it affected the jury's verdicts. (*People v. Smithey, supra,* 20 Cal.4th at p. 960.)

We reject Barrajas's contention that the prosecutor's use of "at least" rather than "approximately" created an error of constitutional magnitude justifying reversal. There is no ground for reversal because the misconduct, if any, was harmless beyond a reasonable doubt. (*Chapman, supra,* 386 U.S. at p. 24.) The prosecutor's use of the term "at least" — viewed within the context of the entire record — does not persuade us to find that Barrajas's trial was fundamentally unfair. (*Thompson, supra,* 49 Cal.4th at p. 120, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181.)

B. Asking Jurors to Stand in the Victim's Shoes

Barrajas contends that the prosecutor's argument improperly asked the jurors' to place themselves in the shoes of the victim. We disagree.

Trial Setting

During closing argument, the prosecutor stated: "We know that this is such a traumatic event. [Julio G.] felt fear. And because it's a traumatic event, ladies and gentleman, I will submit to you that this is going to leave an impression on you and you are going to remember that face. . . . You will remember that face, especially when you got a good look at him. Two to three minutes is what [Julio G.] said."

Analysis

We perceive no impropriety in the prosecutor's argument. As a general rule, a prosecutor " 'may not invite the jury to view the case through the victim's eyes, because to do so appeals to the jury's sympathy for the victim.' " (*People v. Lopez* (2008) 42

Cal.4th 960, 969.) Here, the prosecutor did not ask the jurors to stand in the shoes of the victims, so as to evoke sympathy for the victim. (*Id.* at pp. 969-970; *People v. Farnam* (2002) 28 Cal.4th 107, 167; *People v. Sanders* (1995) 11 Cal.4th 475, 550.) The circumstances surrounding the carjacking, including why the victim, Julio G., could make a strong identification of Barrajas during the crime, was relevant to the victim's credibility. In the event that the prosecutor's argument got too close to invoking sympathy, we find this to be a harmless error for two reasons. First, the prosecutor's argument was consistent with the instruction given on how a juror should approach assessing the credibility of an eyewitness's identification. (See CALCRIM No. 315.) Second, given the strength of the evidence of the carjacking in support of the jury's verdict, including that Barrajas was apprehended in possession of the stolen vehicle shortly after the crime, we see no possibility that the argument about the victim's trauma during the crime had any affect on the jury's verdict.

C. The Prosecutor's Alleged Comment on Barrajas's Right Not to Testify

Lastly, Barrajas argues the prosecutor engaged in misconduct in the form of error under *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*). In Barrajas's perspective, the prosecutor implied, in violation of Barrajas's Fifth Amendment right against self-incrimination, that Barrajas's failure to testify at trial supported an inference of guilt. We find no *Griffin* error. "Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) No more occurred here. "Whether the inferences the prosecutor draws are reasonable is for the jury to decide." (*Ibid.*)

The Trial Setting

During closing argument, the prosecutor stated: "So yes, we have one officer saying one thing and the other officer saying another thing.[9] But what does all this ignore? All this ignores the fact that the defendant himself, Mr. Barrajas, *he testified* --

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[9] Prior to the jury instructions, the prosecutor addressed the issue of the possibility of mistake by stating that Officer Torres identified Barrajas as the driver and Officer Gutierrez wrote in his six-pack that Barrajas was the driver.

did not testify -- I'm sorry. In the interview, he specifically said, 'Look. When the car was stopped by the police, I was the driver, I was driving. I was driving these two girls home and these two guys happened to tag along.' He was the driver." (Italics added.)

Analysis

We will not reverse for two reasons. First, Barrajas forfeited any claim of error concerning the trial setting related to the prosecutor's closing argument by failing to object at trial. (*Thompson, supra*, 49 Cal.4th at p. 120.) Second, we will not reverse because there is no *Griffin* error. Although the prosecutor initially used a word concerning "testifying," he quickly corrected himself to explain that he was talking about Barrajas's interview with police after his arrest. We are unconvinced that the prosecutor invited the jury to infer guilt from Barrajas's silence at trial, and we are not convinced the jury would have understood such an invitation to have been extended. (*People v. Clair* (1992) 2 Cal.4th 629, 662, citing *Griffin, supra,* 380 U.S. at pp. 611-615.) Here, the record discloses no reasonable likelihood the jury would have misunderstood the prosecutor's comment to concern Barrajas failure to testify, nor to mean his silence amounted to an admission of his guilt.

Assuming *Griffin* error, we decline to reverse. To the extent that Barrajas seems to argue there is a problem because of uncertainty about whether Barrajas was the driver or passenger of the carjacked truck when it was stopped, and that, by not taking the stand to explain, the jury then decided to affix guilt, we do not follow his line of reasoning. We see no need to speculate about the jury's thought processes. It was Barrajas's *presence* in the carjacked vehicle when it was stopped that opened the door for the jury's verdict, and, in any event, Barrajas admitted during his police interview that he was the driver. And, in the event the prosecutor's initial misstatement ("testify") is viewed as *Griffin* error, it was harmless beyond any doubt. Based upon the circumstances surrounding the trial and the extent of the record and evidence against Barrajas, we find no possibility that the jury would have returned a different verdict in the absence of the prosecutor's error.

XIII. New Trial

Barrajas contends the trial court's order denying his motion for new trial must be reversed because the court "utilized the wrong standard" in addressing the motion. We disagree.

The Governing law

Section 1181, subdivision (6), authorizes a trial court to grant a new trial when it determines the verdict "is contrary to . . . evidence." The statute is interpreted to mean that, in addressing a motion for new trial, the court "extends no evidentiary deference" to the verdict, and, instead, the court "independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge*, who sits, in effect, as a '13th juror.' [Citations.]" (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133; *People v. Lagunas* (1994) 8 Cal.4th 1030, 1038.) A trial court's ruling on a motion for new trial is reviewed under the abuse of discretion standard. (*People v. Lewis* (2001) 26 Cal.4th 334, 364.) A trial court abuses its discretion when it applies the wrong legal standard governing the issue at hand. (See generally, *Dyer v. Department of Motor Vehicles* (2008) 163 Cal.App.4th 161, 174.) Where a trial court's ruling is based on an erroneous understanding of the law, "the matter must be remanded for an informed determination." (*People v. Downey* (2000) 82 Cal.App.4th 899, 912.)

The Trial Court's Ruling

In Barrajas's current case, the trial court denied his motion for new trial for the following stated reasons: "[T]he law says you need to take the jury's verdict and start with that and give it all of the weight possible, and so the jury makes its determination. And then when I go back and I want to review the jury's verdict, I have to view all of the evidence in the light most favorable to the . . . jury's verdict. [¶] I have another role, to act as a 13th juror, but our first task is to address whether or not a reasonable jury could make the finding that they did that the defendant . . . was guilty of the crimes." The court then proceeded to review the evidence aloud, and, in the end, found that it supported the jury's verdicts.

The trial court then continued as follows: "Now, the next question . . . is to review this as the 13th juror and make the determination . . . whether or not the verdict as a whole was reasonable in light of the evidence. [¶] And even with the finding that the defendant was an aider and abettor, there is sufficient evidence and the court felt that there was sufficient evidence to uphold the conviction." The court then went through the evidence, expressing how the court itself viewed the evidence.

The court concluded: "So when I look at all of the evidence as a whole, either acting as the 13th juror or reviewing it for reasonableness, I find that the jury's verdict was reasonable and I'm going to deny the motion for new trial under . . . section 1118 [*sic*]."[10]

Analysis

We reject Barrajas's claim that the trial court applied the wrong standard when it denied his motion for new trial. *People v. Price* (1992) 4 Cal.App.4th 1272 guides our decision. In *Price*, the trial court denied a motion for new trial after stating both, "I think the evidence was sufficient," and "there is enough evidence there for the jury to do what the jury did." (*Id.* at p. 1275.) Affirming the denial on appeal, the reviewing court explained that the lower court exercised its independent judgment in finding the evidence sufficient and that the court's further comment regarding the reasonableness of the verdict was mere "surplusage." (*Ibid*.) While the reviewing court remarked that it "would have been preferable for the court to have been more specific, stating that it was denying the motion based on its independent weighing of the evidence, its failure to do so and its use of less than artful language cannot be equated with having applied the wrong standard." (*Id*. at p. 1276.)

XIV. The Three Strikes Law Issue

Barrajas contends the trial court abused its discretion in denying his *Romero* motion. (*Romero, supra,* 13 Cal.4th 497.) We disagree.

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[10] The court plainly meant to say section 1181.

When presented with a defendant's *Romero* motion to dismiss a prior strike, a sentencing court is guided by this standard: may the defendant, in light of the nature of his present crime, and his history of prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, "be deemed outside the spirit" of the Three Strikes law, in whole or in part, and, for this reason, be treated as though he did not suffered the prior strike conviction. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) A sentencing court's decision not to dismiss a defendant's prior strike is reviewed on appeal under the abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) A court abuses judicial discretion when it renders a ruling that is arbitrary or absurdly unreasonable. (*People v. Jordan, supra,* 42 Cal.3d at p. 316.)

Barrajas has not persuaded us to declare the trial court abused its discretion. At the time Barrajas committed the charged offenses, he had a robbery "strike" that was less than three years old. In the interim, he suffered two gang injunction convictions. While the victim was not physically injured in this case, the crimes were far from trivial. Barrajas and another member of the Avenues gang carjacked a person at gunpoint. California considers such a crime to be both "serious" and "violent." (§§ 1192.7, subd. (c)(27), 667.5, subd. (c)(17).) When the nature and circumstances of Barrajas's present crimes are considered in light of the particulars of his background, character, and prospects, it is not possible to say that the trial court acted beyond the bounds of reason in denying his motion to dismiss his prior "strike" offense. To avoid irrationality, it is not required to say that Barrajas is outside the spirit of the Three Strikes law.

XV. The Cruel and/or Unusual Punishment Issue

Barrajas contends his sentence amounts to cruel and/or unusual punishment under the federal and state Constitutions. A sentence is considered cruel and unusual under the Eighth Amendment if it is grossly disproportionate to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11; *Rummel v. Estelle* (1980) 445 U.S. 263; cf. *In re Lynch* (1972) 8 Cal.3d 410.) To determine whether proportionality is present, the court must consider the gravity of the offense, the harshness of the penalty, and the sentence imposed on other criminals in the same and other jurisdictions. (*Ewing, supra,* at p. 21.)

For meaningful review of the issue, there must a record allowing for examination of the "proportionality" factors implicated under both the federal and state constitutional prohibitions on excessive punishment. Given that no objection was interposed on this basis in the trial court, we are entirely thwarted in being able to analyze whether the sentence imposed on other criminals in the same and other jurisdictions is proportionate to Barrajas's current case. We can only state that the sentence imposed in this case is applicable to any other defendant sentenced under the same circumstances in this state. Further, life sentences in similar circumstances have been found not to be cruel or unusual. (*People v. Gonzales* (2001) 87 Cal.App.4th 1, 19.)

XVI. Cumulative Error

Barrajas contends the judgment against him must be reversed because the effect of errors, both singly and cumulatively, resulted in a fundamentally unfair trial. Because we have found no errors, with the exception of the sentence-formation matter associated with Barrajas's carjacking conviction (count 1), which may be addressed on remand, we reject his claim of cumulative error. The criminal proceeding against Barrajas, viewed overall, was not fundamentally unfair. The overriding objection presented by Barrajas is that his trial involved significant gang evidence. However, his case involved gang-related allegations. His trial was not fundamentally unfair by the presentation of evidence on a major aspect of his case.

DISPOSITION

Barrajas's convictions are affirmed. The principal used a firearm enhancement is affirmed as to the carjacking (count 1). The gang benefit findings as to all counts (1-3) are affirmed. The 10-year principal used a firearm enhancement on count 1 is stricken.

BIGELOW, P. J.

We concur:

FLIER, J. GRIMES, J.